90-271

Supreme Court, U.S.
FILED
JUL 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

JOSEPH N. AQUILINA, M.D. - PETITIONER
vs.
UNITED STATES OF AMERICA,
U.S. JUSTICE DEPARTMENT
IMMIGRATION & NATURALIZATION SERVICE

PETITION FOR WRIT OF CERTORIARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTORIARI

JOSEPH N. AQUILINA, M.D.
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Tel: (517) 799-4840

Parties To This Proceeding

Joseph N. Aquilina M.D., In Pro. Per., Petitioner

Respondents: United States of America, U.S. Justice Department of Immigration and Naturalization.

Notice of Entry and Order for Intervention of Parties under Federal Rules of Civil Procedure, Rule 24, has been submitted by Rosemarie E. A. Barone, J.D. of Lansing, Michigan, In. Pro. Per., and Joseph W. Aquilina, M.D. of Lansing, Michigan, In Pro. Per., on July 7th, 1990, A.D.

QUESTIONS PRESENTED

(1) Whether U.S.C. Section 301(a)(7) 1952, now Section 301(g) violates due process and equal protection by requiring a ten year residence prior to granting passage of 'jus sanguinis' rights, when U.S.C. Section 301(a)(4) 1952, now Section 301(d) only requires a one year residence for the same right?

(2) Whether U.S.C. Section 301(a)(7) 1952, now Section 301(g) violates Petitioner's fundamental right, freedom of choice, of whom to marry by imposing the ten year residence requirement?

(3) Would a ten year residence requirement which results in the loss of 'jus sanguinis' rights and stateless progeny be considered a denial of due process as well as cruel and unusual punishment violative of the Fifth, Eight and Fourteenth Amendments?

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NO. _____

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

October Term 1990

Joseph N. Aquilina, M.D., Petitioner
vs.
United States of America, U.S. Justice Department
Immigration & Naturalization Service
Defendant, Respondent

PETITION FOR WRIT OF CERTORIARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner, Joseph N. Aquilina, M.D. respectfully prays that a writ of certoriari issue to review the judgement and opinion of the United States Court of Appeals for the Sixth Circuit refusing to support a motion for declaring Section 301(a)(7) 1952, now Section 301(g) 1988 unconstitutional on the basis of denial of due process and equal protection when compared to Section 301(a)(4) 1952, now Section 301(d) 1988. The discrimination within the act takes the form of a longer residence requirement, (10 years v. 1 year), for Fourteenth Amendment citizens who marry non-resident aliens to qualify for the same rights as other citizens who marry non-citizen nationals.

OPINIONS BELOW

The opinion of the Court of Appeals is recorded as Joseph N. Aquilina, M.D., v. United States of America, Case No. 89-1565 and filed April 10, 1990, and appears in Appendix A to this petition. The written opinion of the District Court for Eastern District of Michigan, Joseph N. Aquilina, M.D. v. United States of America, File No. 88-CV-10226-BC appears in Appendix B.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on April 10, 1990 by Clerk Leonard Green. An untimely Motion for Extension of time for Appeal was denied on May 11, 1990 and is filed in Appendix C. This Court's jurisdiction is invoked under Title 28, U.S.C. §1254(1) and 28 U.S.C. §2403(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitutional Amendment V, Amendment VIII and Section I of the XIV Amendments are set forth in Appendix D.

STATEMENT OF CASE

On December 5, 1952, the Petitioner immigrated into the United States of America from the island of Malta. He served in the United States Army from October 11, 1954 until October 10, 1956. On November 18, 1955, while serving with the United States Army in Europe he was naturalized as a United States Citizen at Frankfurt, Germany under Immigration and Nationality Act Section 329. On August 31, 1957 he was married in Rosenheim, West Germany to Mrs. Johanna E. Aquilina, née Gleissner, his wife. Two children were born in Germany: Rosemarie E. A. Barone, J.D. née Aquilina born on April 25, 1958 and Joseph W. Aquilina, M.D. born on March 27, 1959.

The Petitioner was not allowed to pass 'jus sanguinis' rights to his children on the basis of Section 301(a)(7) 1952, now Section 301(g) which at the time required 10 years of residence in the United States by the father prior to the birth of such children.

The Petitioner was never warned by the United States consular officials about the citizenship implications for children born to citizens who married non-resident aliens. The Petitioner was well known to the U.S. Consular personnel since he was registered with them. They knew that he was naturalized while he was serving in the United States Army. Also the Petitioner had informed them of his impending marriage and then of the birth of the children.

Since the children had a father (the Petitioner) who was an American citizen, Germany regarded the children to be U.S. citizens. Also, in 1959 the Petitioner's wife, as a German National, could not pass her German nationality to the children since only illegitimate children of German women were recognized, her children being legitimate, under German law would take the citizenship of the father. Therefore, the Petitioner and his children were abandoned by the United States. The State of Germany declared the children 'STATELESS' and issued to them 'stateless passports.' These children then immigrated to the United States along with their mother on August 13, 1959. The Petitioner had to remain in Germany until January 1963 when he completed his Doctor of Medicine Degree.

On May 1, 1968 these children along with their mother were naturalized as citizens of the United States under section 320(a) of the Nationality Act of 1952. In spite of United States citizenship by 'naturalization,' the Petitioner and his family continue to be subjected to unusual United States Government scrutiny when this question of 'statelessness' at birth comes up.

Consequently on August 9, 1988 the Petitioner filed Civil Action No. 88-CV-10226-BC in the United States District Court, Eastern Division of Michigan, Northern Division for the determination of the constitutionality of Section 301(a)(7), 1952 now designated Section 301(g), 1988. The Hon. James P. Churchill dismissed this complaint with prejudice on April 14, 1989, pursuant to *Fed. R. Civ. P. 12 (b)(6)* for *"failure to state a claim upon which relief can be granted."*

The Petitioner filed an appeal on May 24, 1989 and subsequently filed with the Court a Pro-Se Brief, Reply Brief for the Appellant, as well as a Supporting Brief and an Appendix. On April 10, 1990 the United States Court of Appeals for the Sixth Circuit issued an order in which oral argument was denied under *Fed. R. App. P. 34(a).* The Court also affirmed the District Court's Order under *Rule 9(b)(5), rules of the Sixth Circuit.* This Order was not recommended for full text publication.

REASONS FOR GRANTING THE PETITION

Certoriari should be granted for two reasons: First, the authority utilized by the District Court, and as affirmed by the Court of Appeals for the Sixth Circuit, utilizing *Rogers v. Bellei,* 401 U.S. 815 (1971), stated in context, simply does not apply to this Petitioner. Second, the Opinions of the District Court, Eastern District of Michigan, Northern Division and as affirmed by the Court of Appeals for the Sixth Circuit are untenable, since this Petitioner did state a claim upon which relief can be granted. This Petitioner proved denial of 'due process' and 'equal protection' in that the Congress did not have a legitimate compelling reason to deny this Petitioner's fundamental right of freedom of choice, of whom to marry.

On August 9, 1988 this Petitioner filed Complaint No. 88-CV-10226-BC with the District Court, Eastern District of Michigan, Northern Division in which the Petitioner sought a

declaration that § 301(a)(7) 1952, now § 301(g) is violative of 'due process' and 'equal protection.' On April 14, 1989 that Court dismissed that Petition with Prejudice, pursuant to *Federal Rules of Civil Procedure* 12(b)(6), for *"failure to state a claim upon which relief can be granted."* That Court relied on *Rogers v. Bellei* at 815, 830 (1971). *Bellei* is clearly distinguishable from the case at bar, based on the specific facts involved.

On May 24, 1989 the Petitioner Filed Appeal No. 89-1565 which was docketed with the Court of Appeals for the Sixth Circuit. That Court denied oral argument under *Federal Rule of Appellate Procedure* 34(a). The Court of Appeals also used *Bellei* as their authority. The Court of Appeals then *affirmed* the District Court's Order under 9(b)(5), *Rules of the Sixth Circuit "that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument; or,..."*. The Petitioner once again claims that a fair reading of the Pro-Se Brief and the answers to the questions that were submitted by that Court proves that this Petitioner has been denied both 'due process' and 'equal protection'. Also, the authority of *Bellei* does not support the position of that Court. Therefore, the position of the Court is untenable.

The Petitioner states that §301(a)(4) 1952, now §301(d) 1988, **created** a right to the passage of 'jus sanguinis' rights by the citizen parent to the foreign born children with only one year of residence in the United States, prior to the birth of the children.

The statute under challenge however §301(a)(7) 1952, now § 301(g) 1988, **discriminates** against this Petitioner by a requirement of a 10 year residence prior to the birth of the children for the passage of that same right of 'jus sanguinis'. Therefore, this discrimination within the Act is violative of the 'equal protection' provisions guaranteed to this Petitioner by a panopoly of 'equal protection' provisions of the United States Constitution including the Fifth Amendment. (Compare 1 year v. 10 years). v. 10 years).

Therefore, Congress by creating a discriminatory statute did not follow their constitutional mandate to *"[E]stablish a uniform rule of naturalizatio[n]"* as mandated by the *United States Constitution article I, §8, clause 4.*

The holding in *Rogers v. Bellei,* 401 U.S. 815 (1971), as used by the lower Courts is not applicable to this Petitioner. This Petitioner was a Fourteenth Amendment citizen while Mr. Bellei had obtained his citizenship by derivation through a citizen mother and an alien father. The Petitioner also proved that Congress indeed **had created** a right to the passage of 'jus sanguinis' rights by Fourteenth Amendment parents, to their legitimate offspring, with a one year residence in the United States, prior to the birth of such children. The Court quotes Justice Blackmun: "the Court has specifically recognized the power of Congress not to grant a United States citizen the right to transmit citizenship by descent." *Bellei* U.S. at 830. That quote was taken out of context. It is simply not applicable to the question of denial of 'due process' and 'equal protection' to this Fourteenth Amendment citizen of the United States.

In this present context the Petitioner claims that he is a Fourteenth Amendment citizen of the United States. The District Court never disputed that fact. The District Court has disputed this Petitioner's claim that he has a right to pass his 'jus sanguinis' rights under §301(a)(4) 1952, now §301(d) 1988, because the Petitioner claimed that right since he had resided in the United States for more than one year prior to the birth of his children. The District Court failed to look at the discrimination within the Nationality Act that denied 'equal protection'. The Congress created a right to the passage of 'jus sanguinis' rights with the legislation of Section 301(a)(4) 1952, now Section 301(d) 1988, which qualified some United States citizens to pass their 'jus sanguinis' rights with a residence of one year. The Petitioner claims that he qualifies under that requirement and to deny him that right is violative of both 'due process' and 'equal protection.'

Therefore, the section of the Nationality Act under challenge: §301(a)(7) 1952, now §301(g) 1988, denied the right of this Petitioner to pass 'jus sanguinis' rights by using a discriminatory residence requirement of 10 years for the same rights that the Congress created under §301(a)(4) 1952, now §301(d), 1988 with only a one year requirement. Since United States citizens are protected by a panopoly of 'due process' and 'equal protection' provisions, under the United States Constitution, such a denial of 'equal protection' is illegal. Therefore, the *Bellei* authority, as used by the District Court, fails on its face.

The District Court quotes the authority of *United States v. Trevino Garcia,* 440 F. 2d 368, 369 (5th Cir. 1971); *Villanueva-Jurado v. I.N.S.,* 482 F 2d 886, 887 (5th Cir. 1973); *Uribe-Temblador V. Rosenberg,* 423 F. 2d 717, 717-718 (9th Cir. 1970). These cases are not applicable to this Petitioner but they would have been applicable to the Petitioner's children. The Petitioner did not include his children as part of this complaint exactly because of the cases quoted above. The Congress can exclude such aliens under the statute under challenge if the foreign born children claim their rights to 'jus sanguinis' on their own. The Court has used the principle that "no alien has the slightest right to naturalization unless all statutory requirements are complied with." *Bellei* at 830. The Honorable Judge Churchill did give the children of this Petitioner standing, in that Court Order, even though the children have been intentionally excluded from this complaint.

When, however, the Fourteenth Amendment Parent demands 'due process' and 'equal protection' to pass his 'jus sanguinis' rights to his legitimate children, such as in the case before this Honorable Court, then the Congress cannot deny this basic right of our liberty. The lower court stated:

"Plaintiff Joseph Aquilina, who is not joined by either of his adult children, filed suit on August 9, 1988 seeking United States citizenship at birth for his two naturalized children. Specifically, Plaintiff Aquilina petitioned the Court to declare §301(a)(7) as well as the statute in its current form violative of equal protection." *District Court Order,* No. 88-CV-10226-BC, page 18.

The Petitioner only claimed that with the legislation of §301(a)(4) 1952, now §301(d) 1988, the Congress had created a right for United States citizens to pass their 'jus sanguinis' rights to their legitimate progeny with one year of residence in the United States. The Congress at the same time also created an irrational statute that denied these same rights to citizens of the United States who married non-resident aliens and who therefore were punished by being required to fulfill a 10 year residence requirement for that same right. The irrationality of the Act is based on two key principles: First, Congress denied 'due process' and 'equal protection' by using a longer residence requirement of 10 years, as compared to one year for other citizens. Second, Congress also violated Petitioner's fundamental right to due process, liberty to choose whom to marry, by imposing a longer punitive residence requirement.

The Eighth Amendment protects this Petitioner against cruel and unusual punishment. The Congress required this Petitioner to fulfill a longer residence requirement, that being 10 years prior to the birth of the children, in order to have the right for passage of 'jus sanguinis'. Other citizens married to non-citizen nationals were qualified with one year of residence prior to the birth of the children, to qualify for this same right. Thus, this Petitioner was punished for marrying a non-resident alien. This resulted in his family being abandoned by the United States. As a result, the government of Germany then took jurisdiction of the Petitioner's legitimate children declaring them 'stateless'. The government of Germany recognized only the U.S. citizenship of the father. The State of Bavaria, Germany then issued 'stateless' passports to the children of this Petitioner since the United States did not have a procedure by which a travel document could be issued to the Petitioner's children. In addition, the Petitioner and his family continue to be subject to unusual United States government scrutiny every time the question of 'statelessness' at birth has to be entered in completion of government forms, which results in unnecessary delay and an invasion into personal privacy. This denial of 'due process' and 'equal protection' made this Petitioner a second-class citizen by statute.

In order to more clearly set forth Petitioner's position, it is helpful to closely examine the facts and circumstances confronted by this Court in *Bellei.*

Mr. Bellei was born abroad of a citizen mother and an alien father. Mr. Bellei, therefore, had acquired his citizenship by derivation through a citizen mother. He never fulfilled the requirements of the first clause of the Fourteenth Amendment and he therefore lost his citizenship when he failed to fulfill the residence requirements of Congress. The Court in *Bellei* stated that Congress was authorized to impose conditions subsequent to naturalization for citizens like Mr. Bellei. Ibid *Bellei* at 831. As an authority relied on by the lower courts, the Bellei holding is distinguishable. Thus, it should be held only applicable to citizen Bellei and not this Petitioner.

This Petitioner was naturalized by a United States Court with proper authority and jurisdiction on November 18, 1955, under *§329 of the Immigration and Nationality Act,* at Frankfurt, Germany. The Congress had felt compelled to naturalize members of the Armed Forces who were serving honorably during the Korean War. Therefore, the honorable service and honorable discharge of this Petitioner qualified him as a Fourteenth Amendment citizen of the United States. He is, therefore, absolutely protected from Congressional intrusion into his citizenship rights.

The holding in *Bellei*, when analyzed closely proves why this Petitioner is absolutely protected while citizen Bellei was not:

"Thus at long last, there emerged an express constitutional definition of citizenship. But it was one restricted to the combination of three factors, each and all significant: birth in the United States, naturalization in the United States, and under the jurisdiction of the United States." Ibid *Bellei* at 830.

Note that Justice Black further notes that:

"If, for example, Congress should decide to vest authority to naturalize aliens in American embassy officials abroad rather than have the ceremony performed in this country, I have no doubt that those so naturalized would be just as fully protected by the Fourteenth Amendment." Ibid *Bellei* at 843.

The Petitioner's claim, therefore, has to do more with the right that is intrinsic in the denial of 'due process' and 'equal protection' than his right to 'jus sanguinis.' The Congress created this Petitioner's right to 'jus sanguinis' by legislating § 301(a)(4) 1952, now § 301(d) 1988. Congress really intended for this Petitioner to be excluded by that statute since this Petitioner had neither married a non-citizen national, nor had he resided in the United States for 10 years prior to the birth of the children, which also disqualified him. However, the Constitution comes to the Petitioner's rescue by the panopoly of 'due process' and 'equal protection' provisions.

The Congress, by legislating §301(a)(7) 1952, now §301(g) 1988, could not use this statute to deny 'equal protection' to this Fourteenth Amendment citizen. Also, 'due process' will not allow Congress to deny the right to a free choice of a marriage partner within the fundamental right of a free choice to marry. The Petitioner's claim therefore, that he has those same rights as the citizens who are qualified by Congress under §301(a)(4) 1952, now § 301(d) 1988, is correct, since the Petitioner has proven that he is being denied 'equal protection' and such is prohibited by a panopoly of 'equal protection' provisions of the United States Constitution.

Also, when the Congress wrote the statute under challenge, Congress in fact created an irrational law, as it was always the intent, since the Declaration of Independence, that this Government of the People legislates statutes for the people within a constitutional mandate.

It was, therefore, why the Constitution created that delicate balance between the executive, the legislative and the judiciary branches of government, so as to safeguard those inalienable rights, among which are:

"[L]ife, liberty and the pursuit of happiness. *That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed;(*)* that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish i[t]." The *Declaration of Independence,* paragraph 2 (U.S. 1776)

(*) emphasis added.

The Petitioner proves that the authority of *Bellei,* in which the District Court quoted Justice Blackmun, was not applicable to this Petitioner. The Congress had indeed created a right under § 301(a)(4) 1952, now § 301(d) 1988 to pass 'jus sanguinis' rights for citizens of the United States to their legitimate offspring, with a one year residence, prior to the birth of the children. Since this Petitioner was a Fourteenth Amendment citizen, he was protected by a panopoly of 'due process' and 'equal protection' provisions by the United States Constitution and therefore, this Petitioner has the right to the passage of his 'jus sanguinis' rights in the same manner as other citizens under § 301(a)(4) 1952, now § 301(d) 1988.

The Petitioner has proven that the statute under challenge § 301(a)(7) 1952, now § 301(g) 1988, is violative of both 'due process' and 'equal protection' and is therefore, null and void, under the well known authority of *Marbury v. Madison,* I Cranch 137, 2 LEd. 60, 1803.

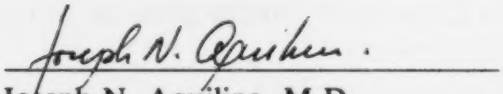
The Petitioner, therefore, requested this Writ of Certoriari in order to ask this Honorable Court to overrule the previous decisions of the District Court and the Court of Appeals since he proved that he had stated a claim upon which relief can be granted. In addition, this Petitioner respectfully requests that this Honorable Court declare the statue under challenge, § 301(a)(7) 1952, now § 301(g) 1988, to be violative of 'due process' and 'equal protection.' Further, in the alternative, this Petitioner asks that this Honorable Court grant this Petitioner the right to pass his 'jus sanguinis' right to his children without specifically ruling on the constitutionality of the statute under challenge.

CONCLUSION

For the reasons set forth above, a writ of certoriari should be granted.

DATED: July 4, 1990

Respectfully Submitted,



Joseph N. Aquilina, M.D.
In Pro. Per.

(*) If this Court elects not to address the issue presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the Court of Appeals for re-determination in light of this Court's Opinion in Bellei.

APPENDIX 'A'

NOT RECOMMENDED FOR FULL TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see
Rule 24 before citing in a proceeding in a court in the Sixth Circuit.
of a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is

FILED
APR 10 1990
LEONARD GREEN, Clerk

No. 89-1565

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH N. AQUILINA, M.D.,
Plaintiff-Appellant,

v. ORDER

UNITED STATES OF AMERICA, U.S.
Justice Department Immigration
& Naturalization,
Defendant-Appellee.

BEFORE: MERRITT, Chief Judge; KRUPANSKY, Circuit Judge; and PECK, Senior Circuit Judge.

This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the record and the briefs, this panel unanimouly agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Plaintiff Aquilina filed an action in which he challenged the constitutionality of legislation (presently codified at 8 U.S.C. §1401) restricting the ability of naturalized citizens to pass their citizenship to their foreign-born children at birth. The district court ultimately dismissed the case and this appeal followed. The parties have briefed the issues, plaintiff Aquilina proceeding without counsel.

Upon consideration, we find that the district court correctly dismissed the complaint. The core of Aquilina's action is his claim that he had a constitutionally cognizable right to pass on his citizenship to his children regardless of the circumstances of their birth. No such absolute right exists in law. Rogers v. Bellei, 401 U.S. 815, 830 (1971). Aquilina lacks standing to assert claims on behalf of his adult children, both of whom are naturalized citizens, hold advanced degrees, and are presumptively capable of litigating their own claims.

Accordingly, the district court's order is affirmed. Rule 9(b)(5), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

_____

Clerk

ISSUED AS MANDATE: May 11, 1990

COSTS: None

A TRUE COPY
Attest:
LEONARD GREEN, Clerk
By: Signed
Deputy Clerk

APPENDIX 'B'

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JOSEPH N. AQUILINA,
Plaintiff,

APR 14 2:29 PM '89

vs.

File No. 88-CV-10226-BC

UNITED STATES OF AMERICA,
Defendant.

ORDER DISMISSING COMPLAINT WITH PREJUDICE

For reasons stated in the Memorandum Opinion bearing the same date as this order, IT IS ORDERED THAT Plaintiff Aquilina's complaint be, and hereby is, *dismissed with prejudice* pursuant to Fed.R.Civ.P. 12(b)(6) for "failure to state a claim upon which relief can be granted." See Fed.R.Civ.P. 12(b)(6).[1]

So ordered.

JAMES P. CHURCHILL
UNITED STATES DISTRICT JUDGE

1. Plaintiff Aquilina's motion for summary judgment obviously is denied in light of the Court's ruling dismissing his complaint with prejudice.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JOSEPH N. AQUILINA,
Plaintiff,

APR 14 2:29 PM '89

vs.

File No. 88-CV-10226-BC

UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM OPINION

Plaintiff Joseph N. Aquilina, M.D., a naturalized United States citizen, has raised an equal protection challenge to 8 U.S.C. §1401, which prescribes the requirements for United States citizenship at birth. Specifically, Plaintiff Aquilina contends that the statute governing United States citizenship "at birth" impermissibly discriminates against naturalized citizens by denying them the ability to immediately pass their citizenship to their children. Because the Court finds Plaintiff Aquilina's constitution attack on 8 U.S.C. §1401 to be foreclosed by binding Supreme Court precedent, the Court shall dismiss Plaintiff Aquilina's complaint with prejudice.

I. The Factual Context of the Dispute

Plaintiff Joseph Aquilina was born on the island of Malta on March 7, 1935; he immigrated to the United States on December 5, 1952. He was drafted by the U.S. Army on October 11, 1954, and became a naturalized United States citizen on November 18, 1955 in Germany while serving in the army. After his release from active duty, he remained in Germany to attend medical school. While in Germany, Plaintiff Aquilina married a Ger-

man national named Johanna Elizabeth Gleissner. Two children were born to the couple in Germany -- Rosemarie on April 25, 1958 and Joseph Wolfgang on March 27, 1959. Both of these children were denied United States citizenship at birth by operation of § 301(a)(7), Title III of the Immigration and Nationality Act of 1952, **Pub. L. No.** 414, 66 Stat. 235 (originally codified at 8 U.S.C. § 1401(a)(7). Mrs. Aquilina and the couple's two children immigrated to the United States in August of 1959. The children, however, remained "stateless" citizens until May 1, 1968 when they and Mrs. Aquilina became naturalized United States citizens.

Plaintiff Joseph Aquilina, who is not joined by either of his adult children, filed suit on August 9, 1988 seeking United States citizenship at birth for his two naturalized children. Specifically, Plaintiff Aquilina petitioned the Court to declare §301(a)(7) as well as the statute in its current form violative of equal protection. In Plaintiff Aquilina's view, 8 U.S.C. § 1401 deprives naturalized United States citizens of the power to pass United States citizenship to their children at birth, yet grants the power to all other United States citizens. Compare 8 U.S.C. § 1401(a)(7) (1952) with 8 U.S.C. § 1401(a)(4) (1952); compare 8 U.S.C.A. §1401(g) (Supp. 1988) with 8 U.S.C.A. §1401(d) (Supp. 1988). On this basis, Plaintiff Aquilina moved for summary judgement on November 23, 1988. The Government responded with a cross-motion to dismiss on January 31, 1989. Thus, the matter is squarely before the Court for consideration.

II. The Statute at Issue -- 8 U.S.C. §1401

The 82nd Congress enacted the Immigration and Nationality Act of 1952 as "a comprehensive, revised immigration, naturalization and nationality code." See **H.R. Rep. No.** 1365, 82nd Cong., 2d Sess., reprinted in 1952 **U.S. Code Cong. & Admin. News** 1653, 1653 (statement of purpose). Included in the Immigration and Nationality Act of 1952 is a provision governing citizenship at birth. See Immigration and Nationality Act of

1952, **Pub. L. No.** 414, § 301, 66 Stat. 235 (1952). This provision, codified at 8 U.S.C. §1401, was in effect when Dr. and Mrs. Aquilina's two children were born. The specific provision at issue, §301(a)(7) of the Act, see 8 U.S.C. §1401(a)(7) (1952), states that:

> The following shall be nationals and citizens of the United States at birth:
>
> (7) a person born outside the geographical limits of the United States and its outlying possessions of parents one whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: Provided, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

8 U.S.C. §1401(a)(7) (1952). With the exception of several minor changes in the provision that are not relevant to the present dispute, see, e.g., **Pub. L. No.** 89-770, 80 Stat. 1322 (1966) (expanding proviso); **Pub. L. No.** 95-432, § 3, 92 Stat. 1046 (1978) (revising numbering of subsections); **Pub. L. No.** 99-653, § 12, 100 Stat. 3655, 3657 (1986) (changing physical presence requirements from "ten years, at least five" years to "five years, at least two" years), the pertinent subsection remains the same today as originally enacted. Compare 8 U.S.C. §1401(a)(7) with 8 U.S.C.A. § 1401(g) (Supp. 1988).

Simply stated, §301(a)(7) of the 1952 Act, 8 U.S.C. § 1401(a)(7) (1952), can be reduced to single proposition: a child born abroad to a U.S. citizen parent and an alien parent is not a U.S. citizen unless his (or her) citizen parent held U.S. citizenship for "not less that ten years" prior to the birth of the child. Even including the time that Plaintiff Aquilina spent in the military after he became a naturalized United States citizen in November of 1955, cf. 8 U.S.C. § 1401(a)(7) (1952) (allowing inclusion of "any periods of honorable service in the Armed Forces of the United States"), Plaintiff Aquilina did not satisfy the ten-year (or even the present five-year) physical presence and citizenship requirements at the time that either of his children was born abroad. Thus, neither of his children could qualify at birth as a United States citizen under § 301(a)(7) (or even under current §301(g)). See 8 U.S.C. §1401(a)(7) (1952) (original version); see also 8 U.S.C.A. 1401(g) (Supp. 1988) (current version with reduced physical presence requirements.). For this reason, Plaintiff Aquilina cannot avail himself of any statutory right to citizenship at birth for his children. Consequently, he cannot claim citizenship at birth for his children without successfully attacking §301(a)(7) of the 1952 Act and, by implication, § 301(g) of the current Immigration and Nationality Act.

III. Equal Protection, Standing and Citizenship

To address the issues raised by Plaintiff Aquilina, the Court must consider the delicate interplay among three constitutionally based concepts -- equal protection, standing and citizenship. While Plaintiff Aquilina cannot rely on the Fourteenth Amendment's equal protection clause in a suit against the United States, see, e.g., News America Publishing, Inc. v. Federal Communications Comm'n, 844 F. 2d 800, 804 (D.C. Cir. 1988), he nevertheless may rely on the Fifth Amendment's equal protection component in this case. See Sturgell v. Creasy, 640 F. 2d 843, 850 (6th Cir. 1981) ("It is well established that the Fifth

Amendment's Due Process Clause which applies to the federal government encompasses equal protection principles."); see also News America, 844 F. 2d at 804 (citing Bolling v. Sharpe, 347 U.S. 497 (1954)). Plaintiff Aquilina, therefore, can assert the full panopoly of equal protection rights afforded to him as a United States citizen in a constitutionally permissible fashion.

Article III of the Constitution, however, places limitations on the federal courts' power to adjudicate disputes. Specifically, Article III "confines the federal courts to adjudicating 'cases' and 'controversies.'" Allen v. Wright, 468 U.S. 737, 750 (1984). Among the various Article III concepts, the "doctrine that requires a litigant to have 'standing' to invoke the power of a federal court is perhaps the most important [.]" Id. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Warth v. Seldin, 422 U.S. 490, 498 (1975). To ascertain whether Plaintiff Aquilina has standing to attack § 301(a)(7) of the Immigration and Nationality Act of 1952 on constitutional grounds, the Court must discern whether Plaintiff Aquilina has "allege[d] personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen, 468 U.S. at 751.

To the extent that Plaintiff Aquilina's children themselves have been wronged through denial of citizenship from birth, they alone are the ones with standing to assert their rights. Cf. Allen, 468 U.S. at 751 ("A plaintiff must allege personal injury[.]"). The supreme Court in Allen explained that the standing doctrine includes "the general prohibition on a litigant's raising another person's legal rights[.]" Id. Thus, Plaintiff Aquilina's challenge to the Immigration and Naturalization Act cannot rest on the rights of his children, who are not parties to this case.

At oral argument, however, Plaintiff Aquilina vociferously argued that his right to pass on his citizenship, rather than his children's right to citizenship at birth, forms the basis for this suit. The Supreme Court's decision in Rogers v. Bellei, 401

U.S. 815 (1971), undercuts this argument. In Bellei, Justice Blackmun wrote for the majority that "the Court has specifically recognized the power of Congress not to grant a United States citizen the right to transmit citizenship by descent." Id. at 830. Moreover, federal appellate courts have consistently held that "the Congress has a completely free hand in defining citizenship as it relates to persons born abroad." See, e.g., United States v. Trevino Garcia, 440 F. 2d 368, 369 (5th Cir. 1971); Villanueva-Jurado v. I.N.S., 482 F. 2d 886, 887 (5th Cir. 1973); Uribe-Temblador v. Rosenberg, 423 F. 2d 717, 717-718 (9th Cir. 1970). For these reasons, the Court finds that Plaintiff Aquilina's equal protection rights, which he most assuredly possesses as a United States citizen, do not afford him the right to pass his United States citizenship to his children by descent. See Bellei, 401 U.S. at 830. Plaintiff Aquilina's argument to the contrary, like Justice Black's eloquent dissent in Bellei, is com---pelling yet inconsistent with binding precedent.[1]

Accordingly, the Court shall enter an order dismissing Plaintiff Aquilina's complaint.

Signed
JAMES P. CHURCHILL
UNITED STATES DISTRICT JUDGE

1. Plaintiff Aquilina essentially argues for "the rule of descent by blood, 'jus sanguinis[.]'" See United States v. Wong Kim Ark, 169 U.S. 649, 667 (1898). On at least two occasions, the United States Supreme Court has repudiated the concept of 'jus sanguinis'. See id. at 674, 702-03; Bellei, 401 U.S. at 830.

CERTIFICATE OF SERVICE

UNITED STATES OF AMERICA

Case No. 88-CV-10226-BC

EASTERN DISTRICT OF MICHIGAN

Pursuant to Rule 77(d), FRCivP, I, the undersigned, certify that I have on the 14th day of April, 1989, mailed a copy of the MEMORANDUM OPINION AND ORDER DISMISSING COMPLAINT WITH PREJUDICE in the foregoing cause to the following persons at the addresses given.

Dr. Joseph N. Aquilina
3406 Davenport Street
Saginaw, MI 48602

Ms. Janet L. Parker
Assistant U.S. Attorney
(Hand-delivered)

Signed _____

Erma L. Thomas, Secretary to
Judge James P. Churchill

APPENDIX 'C'

RECEIVED
MAY 11, 1990
LEONARD GREEN, Clerk

FILED
MAY 11, 1990
LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

JOSEPH N. AQUILINA, M.D.
Plaintiff-Appellant,

File Number: 89-1565

v.

MOTION FOR EXTENSION OF TIME

UNITED STATES OF AMERICA,
U.S. Justice Department,
Immigration & Naturalization,
Defendant.

CHIEF JUDGE MERRITT
CIRCUIT JUDGE KRUPANSKY
SENIOR CIRCUIT JUDGE PECK

JOSEPH N. AQUILINA, M.D., In Pro. Per.
3406 Davenport Avenue
Saginaw, Michigan 48602
(517) 799-4840

5-11-90 DENIED BY ORDER OF THE COURT

JANET L. PARKER (P34931)
Attorney for Defendant
204 Federal Bldg.
Bay City, Michigan 48707-0026
(517) 895-5712

MOTION FOR EXTENSION OF TIME

NOW COMES the Plaintiff, JOSEPH N. AQUILINA, M.D., a resident of Saginaw, Michigan, in pro per and for Motion for an Extension of time for appeal states as follows:

1. That Plaintiff and his family were out of the Country during the date an appeal could be filed.

2. That upon arriving in Detroit on the evening of April 21, 1990, Plaintiff was unable to return to Saginaw upon discovering that his mother had been placed in Oakwood Hospital, Dearborn, Michigan during the time he was out of the Country.

3. That Plaintiff, because he was unable to return to Saginaw until on or about April 23, 1990, did not receive the judgement and answer which had been postmarked April 12, 1990, until after his date of return on or about April 23, 1990.

4. That once Plaintiff reviewed the judgement and answer Plaintiff called the court clerk to ask what the time limitations were for an appeal to be filed and was notified that the time had passed.

5. That Plaintiff is not an attorney and is not accustomed to the strict time for filing an appeal.

6. That Plaintiff wishes to file an appeal should an extension of time be granted.

WHEREFORE, THIS PLAINTIFF RESPECTFULLY REQUESTS that:

A. Plaintiff be given an additional 14 (fourteen) days to file an appeal;

B. The additional days granted begin running the date the attached Order is signed.

C. This Honorable Court grant any additional or substitute relief which can be granted under the law and as equity dictates.

D. An Order has been properrly attached which the Plaintiff respectfully requests the Honorable Court to review and sign should it agree with the extension of time.

Dated: May 7, 1990

By: Signed
JOSEPH N. AQUILINA, M.D., In Pro. Per.
3406 Davenport Avenue
Saginaw, Michigan 48602
(517) 799-4840

RECEIVED
MAY 11, 1990
LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

JOSEPH N. AQUILINA, M.D. File Number: 89-1565
Plaintiff-Appellant,

v. ORDER FOR EXTENSION OF TIME

UNITED STATES OF AMERICA,
U.S. Justice Department,
Immigration & Naturalization, CHIEF JUDGE MERRITT
Defendant. CIRCUIT JUDGE KRUPANSKY
SENIOR CIRCUIT JUDGE PECK

JOSEPH N. AQUILINA, M.D., In Pro. Per.
3406 Davenport Avenue
Saginaw, Michigan 48602
(517) 799-4840

JANET L. PARKER (P34931)
Attorney for Defendant
204 Federal Bldg.
Bay City, Michigan 48707-0026
(517) 895-5712

ORDER FOR EXTENSION OF TIME

AT A SESSION OF SAID COURT, HELD IN THE COURTHOUSE IN THE CITY OF , COUNTY OF_____, STATE OF_____, ON THE_____DAY OF_____, 1990, A.D.

PRESENT: THE HONORABLE _____

PLAINTIFF, Joseph N. Aquilina, M.D., having made a motion on or about the day of May, 1990, In Pro. Per. and this Honorable Court having read the motion submitted by the Plaintiff, this Honorable Court being fully advised as to the reasons for the request to extend the time for which a request for a rehearing can be made;

NOW THEREFORE, IT HEREBY IS ORDERED that Plaintiff's Motion for an Extension of Time to File an Appeal, that date being fourteen days from the date of the signing of this order, or the day, in the month of , 1990, A.D., be granted.

DATED: _____

THE HONORABLE

APPENDIX 'D'

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

ARTICLE XIV
First Clause

Section I: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX 'E'

CURRENT APPLICABLE LAW

Section 301(a)(7), Title III, of the Immigration Act of 1952, now designated Section 301(g) of the Nationality Act of October 10, 1978 now in force and being challenged by this complaint.

(g) A PERSON BORN OUTSIDE THE GEOGRAPHICAL LIMITS OF THE UNITED STATES AND ITS OUTLYING POSSESSIONS OF PARENTS ONE OF WHOM IS AN ALIEN, AND THE OTHER A CITIZEN OF THE UNITED STATES WHO, PRIOR TO THE BIRTH OF SUCH PERSON, WAS PHYSICALLY PRESENT IN THE UNITED STATES OR ITS OUTLYING POSSESSIONS FOR A PERIOD OR PERIODS TOTALLING NOT LESS THAN FIVE YEARS, AT LEAST TWO OF WHICH WERE AFTER ATTAINING THE AGE OF FOURTEEN YEARS: PROVIDED, THAT ANY PERIODS OF HONORABLE SERVICE IN THE ARMED FORCES OF THE UNITED STATES, OR PERIODS OF EMPLOYMENT WITH THE UNITED STATES GOVERNMENT OR WITH AN INTERNATIONAL ORGANIZATION AS THAT TERM IS DEFINED IN SECTION 288 OF TITLE 22 BY SUCH PARENT, OR ANY PERIODS DURING WHICH SUCH CITIZEN PARENT IS PHYSICALLY PRESENT ABROAD AS THE DEPENDENT UNMARRIED SON OR DAUGHTER AND A MEMBER OF THE HOUSEHOLD OF A PERSON (A) HONORABLY SERVING WITH THE ARMED FORCES OF THE UNITED STATES, OR (B) EMPLOYED BY THE UNITED STATES GOVERNMENT OR AN INTERNATIONAL ORGANIZATION AS DEFINED IN SECTION 288 OF TITLE 22, MAY BE INCLUDED IN ORDER TO SATISFY THE PHYSICAL-PRESENCE REQUIREMENT OF THIS PARAGRAPH. THIS PROVISO SHALL BE APPLICABLE TO PERSONS BORN ON OR AFTER DECEMBER 24, 1952, TO THE SAME EXTENT AS IF IT HAD BECOME EFFECTIVE IN THIS PRESENT FORM ON THAT DATE.

1986 Amendment. Subsection (g) Pub. L. 99-653 substituted "five years, at least two" for "ten years, at least five."

1978 Amendment. *****(1) to (7) as to (g) respectively.

(d) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States.

APPENDIX 'F'

IMMIGRATION AND NATIONALITY ACT

Section 320(a). A child born outside of the United States, one of whose parents at the time of the child's birth was an alien and the other of whose parents then was and never thereafter ceased to be a citizen of the United States, shall, if such alien parent is naturalized, become a citizen of the United States, when --

(1) such naturalization takes place while such child is under the age of sixteen years; and

(2) such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of naturalization or thereafter and begins to reside permanently in the United States while under the age of sixteen years.

IMMIGRATION AND NATIONALITY ACT

Section 329. (a)* Any person who, while an alien or a non-citizen national of the United States, has served honorably in an active-duty status in the military, air, or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 1, 1946, or during a period beginning June 25, 1950, and ending July 1, 1955, or during a period beginning February 28, 1961 and ending on a date designated by the President by Executive order shall designate as a period in which Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force, and who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section if (1) at the time of enlistment or induction such person shall have been in the United States, the Canal Zone, American Samoa, or Swains Island, whether or not he has been lawfully admitted to the United States for permanent residence, or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence.

The executive department under which such person served shall determine whether persons have served honorably in an active-duty status, and whether separation from such service was under honorable conditions: Provided, however, That no person who is or has been separated from such service on account of alienage, or who was a conscientious objector who performed no military, air, or naval duty whatever or refused to wear the uniform, shall be regarded as having served honorably or having been separated under honorable conditions for the purposes of this section. No period of service in the Armed forces shall be made the basis of a petition for naturalization under this section if the applicant has previously been naturalized on the basis of the same period of service.

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* As amended by the Acts of September 26, 1961 (75 Stat. 654) and October 24, 1968 (82 Stat. 1343).

(b) A person filing a petition under subsection (a) of this section shall comply in all other respects with the requirements of this title, except that --

(1)* he may be naturalized regardless of age, and notwithstanding the provisions of section 318 as they relate to deportability and the provisions of section 331;

Sec. 3 of the Act of October 24, 1968 (82 Stat. 1343), provides as follows:

Sec. 3. Notwithstanding any other provisions of law, no clerk of a United States court shall charge and collect a naturalization fee from an alien who has served in the military, air, or naval forces of the United States during a period beginning February 28, 1961, and ending on the edge designated by the President by Executive order as the date of termination of the Vietnam hostilities, or thereafter during any other period which the President by Executive order shall designate as a period in which Armed forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force, and who is applying for naturalization during such periods under section 329 of the Immigration and Nationality Act, as amended by this Act, for filing a petition for naturalization or issuing a certificate of naturalization upon his admission to citizenship, and no clerk of any State court shall charge or collect any fee required to be paid to the State shall be charged or collected. A report of all transactions under this section shall be made to the Attorney General as in the case of other reports required of clerks of courts by title III of the Immigration and Nationality Act.

* As amended by the Act of October 24, 1968 (82 Stat. 1343)

(11-6-68)

(2) no period of residence or specified period of physical presence within the United States or any State shall be required;

(3)* the petition for naturalization may be filled in any court having naturalization jurisdiction regardless of the residence of the petitioner; and

(4)* service in the military, air, or naval forces of the United States shall be proved by a duly authenticated certificate from the executive department under which the petitioner served or is serving, which shall state whether the petitioner served honorably in an active-duty status during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or during a period beginning February 28, 1961, and ending on a date designated by the President by Executive order as the date of termination of the Vietman hostilities, or thereafter during any other period which the President by Executive order shall designate as a period in which Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile force, and was separated from such forces under honorable conditions.

(c) Citizenship granted persuant to this section may be revoked in accordance with section 340 of this title if at any time subsequent to naturalization the person is separated from the military, air, or naval forces under other than honorable conditions, and such ground for revocation shall be in addition to any other provided by law. The fact that the naturalized person was separated from the service under other than honorable conditions shall be proved by a duly authenticated certification from the executive department under which the person was serving at the time of separation.

(*) As amended by the Acts of September 26, 1961 (75 Stat. 654); October 24, 1968 (82 Stat. 1343); and Dec. 29, 1981, Pub. L 97-116, §15 (95 Stat. 1619).

TM 102 (2-17-82)

(d) The eligibility for naturalization of any person who filed a petition for naturalization prior to January 1, 1947, under section 701 of the Nationality Act of 1940, as amended (56 Stat. 182, 58 Stat. 886, 59 Stat. 658; 8 U.S.C. 1001), and which is still pending on the effective date of this Act, shall be determined in accordance with the provisions of this section.

*As amended by the Act of October 24, 1968 (82 Stat. 1343)½ (11-6-68)

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA
October Term 1990

NO. _____

Joseph N. Aquilina, M.D., Petitioner

vs.

United States of America, U.S. Justice Department of Immigration & Naturalization, Defendant, Respondent

---

PROOF OF SERVICE

I, JOSEPH N. AQUILINA, do swear or declare that on this date, 7th August, 1990, A.D., pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached PETITION FOR WRIT OF CERTORIARI on each party to the above proceeding, or that parties' counsel, and on every other person required to be served by depositing an envelope containing the above documents with the United States Post Office, properly addresses to each of them and with first class postage pre-paid affixed thereon, and also each envelope was mailed return receipt.

The names and addresses of those served are as follows:

1. SUPREME COURT OF THE UNITED STATES: Attention: Clerk; 1 First Street, N.E.; Washington, D.C. 20543.

2. Solicitor General, Department of Justice; Washington, D.C. 20530

3. Janet Parker, J.D., Assistant U.S. Attorney, 203 Federal Bldg., 1000 Washington; Bay City, Michigan 48708. Tel: (517) 985-5712

BY: Joseph N. Aquilina
JOSEPH N. AQUILINA, M.D.

Subscribed and sworn before me
on the 7th day of August, 1990, A.D.
in the county of Saginaw, State of Michigan.
My commission expires: Jan 19, 1992
Sally Ann LaPorte
Notary Public in and for said County and State

SALLY ANN LAPORTE
Notary Public, Saginaw County, MI
My Commission Expires Jan. 19, 1992